Supreme Court, U.S.
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CAPITAL CASE - NO DATE OF EXECUTION SET
No. 00-1742

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In the
Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

Petitioner's Opposition To Respondent's Motion To Strike

Petitioner Abu-Ali Abdur'Rahman respectfully submits this opposition to the Motion of respondent Ricky Bell to strike portions of the brief of *amici curiae* National Mental Health Association *et al.* in support of the petition for a writ of certiorari ("NMHA Brief").

1. An appendix to the NMHA Brief reproduces sworn affidavits of a majority of the jurors who voted to sentence petitioner to death. The Brief maintains (at 11) that the affidavits support the petition because they contradict the Sixth Circuit's *sua sponte* determination in this case that petitioner was not prejudiced by the constitutionally defective assistance of his counsel in failing to introduce mitigating evidence:

6 pp

> [The jurors] each expressed dismay at not having been informed of, *inter alia*, Petitioner's history of mental illness and hospitalizations, childhood abuse, attempted suicides, and homosexual threats against him in prison. Most of the jurors stated that had they known these facts about Petitioner's background they probably would have voted for a life sentence.

Respondent has moved to strike the affidavits, as well as that portion of NMHA's argument that rests on the affidavits, on two grounds: (i) the affidavits are not part of the record; and (ii) the affidavits are inadmissible under Fed. R. Evid. 606(b).

2. Respondent's Motion is flawed in three distinct respects and accordingly should be denied.

a. First, this case is pending only at the certiorari stage, not on the merits. NMHA invokes the juror affidavits merely to highlight that certiorari should be granted in this capital case because of the considerable doubts surrounding the panel majority's essentially unexplained holding that the unintroduced mitigation evidence would not have affected the jurors at sentencing. Contrary to the premises of respondent's Motion, therefore, the Court is not being called upon to "'affirm or reverse,'" determine the "'lawfulness of the conviction,'" or decide "'the validity of a verdict'" at this preliminary stage of the case. Motion at 2 (quoting *Russell* v. *Southard*, 53 U.S. (12 How.) 139, 159 (1851); *Hopt* v. *Utah*, 114 U.S. 488, 491-92 (1885); Fed. R. Evid. 606(b)). Petitioner has consulted with *amicus* NMHA, which has confirmed that it does not intend to reproduce or

rely upon the affidavits if certiorari is granted.[1]

b. Second, Respondent's specific reliance on Fed. R. Evid. 606(b) is erroneous. The Federal Rules of Evidence do not apply in this Court. See Fed. R. Evid. 101, 1101 (rules apply in bankruptcy courts, district courts, and courts of appeals). Compare S. Ct. R. 17.2 (providing that Federal Rules of Evidence may be used for guidance in *original* actions).

Moreover, Rule 606(b) is on its face inapposite. As noted, this stage of the proceedings does not involve "an inquiry into the validity of a verdict or indictment," but rather an inquiry into whether this case merits certiorari.[2] Additionally, because the affidavits state what effect additional evidence would have had upon the jurors, they do not reflect the jurors' testimony:

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[1] It is furthermore entirely understandable that the affidavits were not collected and introduced below. A substantial question arose regarding whether petitioner was prejudiced by the ineffective assistance of his counsel only *after* the court of appeals *sua sponte* reinstated petitioner's death sentence notwithstanding the extensive record compiled before the district court.

[2] Even if the affidavits were regarded as going to the merits of petitioner's case at this stage, invoking Rule 606(b) to strike the affidavits would give rise to a substantial constitutional question that ought to be avoided. If applicable, Rule 606(b) would present a *per se* prohibition on the use of compelling evidence to demonstrate that petitioner was unconstitutionally sentenced. There is no dispute in this case that petitioner received constitutionally ineffective assistance of counsel; the only remaining issue is whether that constitutional error was harmless. To prohibit petitioner from introducing compelling evidence that he was prejudiced without any showing (indeed, without any suggestion) that the evidence is somehow unreliable would raise a substantial due process concern.

> as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith . . . .

Fed. R. Evid. 606(b).

c. In any event, the remedy for respondent's objections would not be to strike portions of the NMHA brief. Neither the rules of this Court nor Rule 606(b) mandate that juror affidavits be excised from the case file, as opposed to simply ignored. The only effect of ordering that these materials be stricken would be to require a group of public interest mental health organizations to incur the not-insubstantial cost of reprinting their brief.

Ignoring, rather than striking, inappropriate materials appears to be the Court's regular practice. *Amici* constantly present extra-record materials and materials that do not comply with the Federal Rules of Evidence. Those submissions are not ordered stricken, however. The process of policing *amicus* submissions, and passing upon motions such as this one, would create an unnecessary additional administrative burden on the Court and potentially deter valuable submissions.

The Court of course thus regularly denies motions to strike all or a portion of an amicus brief.[3] Indeed, Petitioner has

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[3] *See, e.g., Thompson* v. *Calderon*, 520 U.S. 1259 (1997); *California Dep't of Corrs.* v. *Morales*, 513 U.S. 1074 (1995); *International Soc'y for Krishna Consciousness* v. *Lee*, 503 U.S. 933 (1992); *United States* v. *Mabus*, 502 U.S. 904 (1991); *Gilmer*

been unable to identify even a single case in which this Court has *ever* granted a motion to strike a portion of an amicus brief.[4]

No doubt, a motion to strike an *amicus* submission may be appropriate in extraordinary circumstances not present here. Only two sentences of the NMHA Brief are in question. There is no doubt as to the authenticity or veracity of the affidavits. And, if anything, the affidavits are simply more specific support for a proposition that *amici* are well-suited to present to this Court: that evidence of the sort that should have been presented in this case does affect jurors' determination whether to impose the death penalty.

Conclusion

For the foregoing reasons, the Motion of respondent Ricky Bell to strike portions of the brief of *amici curiae* National

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v. *Interstate/Johnson Lane Corp.*, 498 U.S. 1011 (1990); *Davis* v. *Bandemer*, 470 U.S. 1083 (1985); *Massachusetts* v. *Sheppard*, 464 U.S. 1034 (1984); *Oliphant_v. Suquamish Indian Tribe*, 431 U.S. 964 (1977); *Costello* v. *Wainwright*, 430 U.S. 325 (1977); *Antoine* v. *Washington*, 419 U.S. 1043 (1974); *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 815 (1974); *California Dep't of Human Resources Devel.* v. *Java*, 401 U.S. 932 (1971); *Murfreesboro* v. *Rutherford County*, 361 U.S. 919 (1969); *Harman* v. *Forssenius*, 379 U.S. 987 (1965); *United States* v. *Mississippi*, 379 U.S. 952 (1965); *Clay* v. *Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 861 (1958)(all denying such motions).

[4]In fact, petitioner has been able to identify only a single, extraordinary instance in which a motion to strike even an amicus brief in its entirety was granted. *See Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 503 U.S. 1002 (1992).

Mental Health Association *et al.* in support of the petition for a writ of certiorari should be denied.

Respectfully submitted,

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